

Update: Michigan Circuit Court Benchbook

CHAPTER 4

Criminal Proceedings

Part I—Preliminary Proceedings (MCR Subchapters 6.000 and 6.100)

4.5 Attorneys—Waiver of Counsel

A. Right of Self-Representation

Insert the following text on page 283 before the last paragraph in this subsection:

Where the defendant never expressly stated that he wished to represent himself, the trial court denied the defendant's request for substitute counsel or the opportunity to retain counsel, the defendant represented himself with standby counsel at important pretrial hearings and during jury voir dire, and the defendant did not expressly waive his right to counsel until immediately before trial, the defendant was effectively denied counsel at critical stages of the criminal proceedings against him, and his conviction was reversed. *People v Willing*, ___ Mich App ___, ___ (2005).

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Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.11 Motion to Suppress Defendant's Statement

C. Evidentiary (“Walker”) Hearing

1. Voluntary, Knowing, and Intelligent Confession

Insert the following text after the first full paragraph near the top of page 301:

A defendant may make a voluntary, knowing, and intelligent waiver of his or her right against self-incrimination, even when the defendant was intoxicated and suicidal at the time of the confession. *People v Tierney*, ___ Mich App ___, ___ (2005). The *Tierney* Court affirmed the trial court's analysis of the *Cipriano* factors and emphasized that a defendant's intoxication was only one of the eleven *Cipriano* factors. The Court noted that any effect that the defendant's intoxication may have had on the defendant was significantly outweighed by other factors, including the defendant's college education, his experience with the criminal justice system, the absence of any threats, and the fact that necessities (medical care, for example) were not withheld from the defendant during police questioning.

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Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.11 Motion to Suppress Defendant's Statement

C. Evidentiary (“Walker”) Hearing

5. Waiver of *Miranda* Rights

Insert the following text after the second paragraph on page 305:

A defendant who is intoxicated and claims to be suicidal may make a valid waiver of his or her *Miranda* rights as long as the totality of circumstances supports a finding that the waiver was voluntary, and that it was made knowingly and intelligently. *People v Tierney*, ___ Mich App ___, ___ (2005). In *Tierney*, the defendant's college education and familiarity with the criminal justice system, coupled with the evidence that the defendant conducted himself in a coherent and rational manner during police questioning, supported the trial court's conclusion that the defendant's confession was voluntary and properly admitted at trial.

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Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.21 Search and Seizure Issues

E. Was a Warrant Required?

1. “Exigent Circumstances,” “Emergency Doctrine,” or “Hot Pursuit”

Insert the following text after the second full paragraph on page 340:

The emergency aid exception justified the warrantless entry of the defendant’s parents’ home, where officers, looking through a window in the front door to the house, saw a motionless person slumped over the kitchen table in close proximity to a rifle and ammunition. *People v Tierney*, ___ Mich App ___, ___ (2005). Based on these specific and articulable facts, officers had a reasonable belief that the person slumped over the table may have needed emergency medical assistance.

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Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.23 Dwelling Searches

A. Generally

Insert the following text before subsection (B) near the bottom of page 352:

Depending on the circumstances, an individual may not have a reasonable expectation of privacy in an enclosed porch through which a person must pass in order to get to the dwelling's front door. *People v Tierney*, ___ Mich App ___ (2005). In *Tierney*, the trial court conducted a fact-intensive inquiry and determined that the defendant did not have a reasonable expectation of privacy in an enclosed porch. The trial court noted that although the porch was enclosed and partially curtained, the porch area was unheated and used as a storage area, not a living area. Additionally, there was not a doorbell adjacent to the exterior porch door; instead, the dwelling's doorbell was located next to the interior door. Furthermore, a "welcome" sign hung, not next to the outer porch door, but next to the interior door. Based on the court's examination of the porch's physical attributes and the uses to which the porch was put, the trial court properly concluded that the defendant had no reasonable expectation of privacy in the porch area.

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Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.23 Dwelling Searches

C. Factors Involved in Dwelling Searches

4. Warrantless Entry

Insert the following text at the top of page 355 before Section 4.24:

See also *People v Tierney*, ___ Mich App ___ (2005), where the emergency aid exception justified police officers' warrantless entry into a home after the officers saw through a window in the front door that a motionless person was slumped over the kitchen table and a rifle and ammunition were in close proximity to the person.

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Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.24 Investigatory Stops

B. Traffic Stop

Insert the following text after the June 2005 update to page 356:

Police officers may stop a vehicle if the officers have reasonable suspicion that the vehicle was involved in criminal activity, even if the officers do not possess reasonable suspicion that the driver or owner of the vehicle was engaged in that conduct. *United States v Marxen*, ___ F3d ___, ___ (2005). Because a traffic stop under these circumstances is lawful, any evidence seized as a result of the stop is lawfully obtained, even if the items seized are unrelated to the criminal activity that prompted the traffic stop. *Marxen, supra* at ___.

In *Marxen*, the defendant's vehicle was identified as the car used by suspects in an armed robbery. Although the defendant did not match the description of either of the suspects and police had not observed the defendant interact with either of the suspects during their post-robbery surveillance of the defendant, the investigative traffic stop that occurred eleven days after the robbery did not violate the defendant's constitutional rights. During the stop, which was based solely on the fact that the vehicle's description and license plate matched that of the car used in the robbery, police officers noticed a marijuana pipe and a bag of marijuana in plain view in the defendant's car. Because the stop was lawful, the seizure of the unlawful items—seen by officers who were lawfully in a position to see them—was also proper. *Marxen, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.31 Felony Plea Proceedings

E. Standard of Review

Replace the third paragraph on page 387 and the March 2005 update to page 387 with the following text:

In *Halbert v Michigan*, 545 US ____ (2005), the United States Supreme Court concluded that an indigent defendant convicted by plea may not be denied the appointment of appellate counsel to seek a discretionary appeal of his or her conviction. *Halbert* overrules the Michigan Supreme Court's decisions in *People v Harris*, 470 Mich 882 (2004) and *People v Bulger*, 462 Mich 495 (2000), and it nullifies MCL 770.3a, the statutory provision that addresses the appointment of counsel to indigent defendants convicted by plea.

Specifically, the *Halbert* Court noted that an appeal by right or by leave to Michigan's intermediate appellate court (the Court of Appeals) constituted a first-tier review of a defendant's case, the disposition of which, to some degree, entailed an adjudication of its merits. *Halbert, supra* at _____. Due process and equal protection demand that an indigent defendant not be deprived of counsel in advancing what will most likely be the only direct review the defendant's plea-based conviction and sentence will receive. *Halbert, supra* at _____.

CHAPTER 4

Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.35 Withdrawal of a Guilty Plea

G. Appealing a Guilty Plea

Replace the text on pages 394 and 395 and the March 2005 update to those pages with the following text:

In *Halbert v Michigan*, 545 US ____ (2005), the United States Supreme Court concluded that an indigent defendant convicted by plea may not be denied the appointment of appellate counsel to seek a discretionary appeal of his or her conviction. *Halbert* overrules the Michigan Supreme Court's decisions in *People v Harris*, 470 Mich 882 (2004) and *People v Bulger*, 462 Mich 495 (2000), and it nullifies MCL 770.3a, the statutory provision that addresses the appointment of counsel to indigent defendants convicted by plea.

Specifically, the *Halbert* Court noted that an appeal by right or by leave to Michigan's intermediate appellate court (the Court of Appeals) constituted a first-tier review of a defendant's case, the disposition of which, to some degree, entailed an adjudication of its merits. *Halbert, supra* at _____. Due process and equal protection demand that an indigent defendant not be deprived of counsel in advancing what will most likely be the only direct review the defendant's plea-based conviction and sentence will receive. *Halbert, supra* at _____.

CHAPTER 4

Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.41 Confrontation

A. Defendant's Right of Confrontation

4. Unavailable Witness

Insert the following text after the first paragraph near the top of page 415:

In *United States v Arnold*, ___ F3d ___ (CA 6, 2005), the Sixth Circuit expounded on the Supreme Court's discussion of testimonial evidence in *Crawford v Washington*, 541 US 36, 50–62 (2004), by examining the dictionary definitions of the terms “testimony” and “testimonial.” In *Arnold*, the court noted that “[t]he Oxford English Dictionary (‘OED’) defines ‘testimonial’ as ‘serving as evidence; conducive to proof;’ as ‘verbal or documentary evidence;’ and as ‘[s]omething serving as proof or evidence.’ . . . The OED defines ‘testimony’ as ‘[p]ersonal or documentary evidence or attestation in support of a fact or statement; hence, *any form of evidence or proof.*’ (emphasis added).” The Court further noted that Webster’s Third New International Dictionary of the English Language “defines ‘testimonial’ as ‘something that serves as evidence: proof.’” The dictionary definitions, coupled with *Crawford*’s standard that statements made to government officers— including police—are testimonial in nature and should not be admitted when a defendant has not had the opportunity to cross-examine the declarant, compelled the *Arnold* Court to conclude that the out-of-court statements were improperly admitted against the defendant at trial.

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Criminal Proceedings

Part V—Trials (MCR Subchapter 6.400)

4.48 Jury Instructions

C. Instructions on Lesser Included Offenses

1. Necessarily Included Lesser Offenses

Insert the following text after the May 2005 update to page 433:

Assault with intent to do great bodily harm less than murder is a lesser included offense of assault with intent to commit murder; therefore, the trial court properly instructed the jury on both offenses. *People v Brown*, ___ Mich App ___, ___ (2005). In *Brown*, the defendant fired a gun toward several individuals, three of whom were injured, and one of whom suffered serious and permanent injuries. The defendant asserted that assault with intent to do great bodily harm less than murder was a cognate lesser offense of assault with intent to commit murder and objected to the trial court's decision to instruct the jury on the lesser charge. A majority of the *Brown* panel concluded that the specific intent necessary for the offense of assault with intent to do great bodily harm less than murder was "completely subsumed" by the specific intent necessary for the offense of assault with intent to commit murder.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

B. Sentencing Guidelines

Insert the following text after the partial paragraph at the top of page 450:

A trial court may properly consider an individual's postprobation conduct when imposing a sentence of imprisonment following revocation of the individual's probation. *People v Hendrick*, ___ Mich ___, ___ (2005). A court may look to an individual's postprobation conduct to determine whether substantial and compelling reasons warrant a departure from the minimum sentence range recommended under the legislative guidelines. *Hendrick*, *supra* at ___.

An individual's probation violation alone—without regard to the specific conduct underlying the violation—may constitute a substantial and compelling reason to depart from the sentencing guidelines. *People v Schaafsma*, ___ Mich App ___, ___ (2005). According to the *Schaafsma* Court:

“[A]ny probation violation represents an affront to the court and an indication of an offender's callous attitude toward correction and toward the trust the court has granted the probationer. The violation itself is objective and verifiable, so we see no reason why a court must focus exclusively on the underlying conduct, especially since the conduct itself may be punished in a separate proceeding. We conclude that the offender's probation violation itself is an objective and verifiable factor worthy of independent consideration. Since the probation violation is objective and verifiable, in its discretion the trial court may conclude that the factor provides a substantial and compelling reason to depart from the sentencing guidelines.” *Schaafsma*, *supra* at ___.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

F. Appeal Rights

Delete the first three paragraphs of this subsection and the March 2005 update to page 455 and insert the following text:

In *Halbert v Michigan*, 545 US ____ (2005), the United States Supreme Court concluded that an indigent defendant convicted by plea may not be denied the appointment of appellate counsel to seek a discretionary appeal of his or her conviction. *Halbert* overrules the Michigan Supreme Court's decisions in *People v Harris*, 470 Mich 882 (2004) and *People v Bulger*, 462 Mich 495 (2000), and it nullifies MCL 770.3a, the statutory provision that addresses the appointment of counsel to indigent defendants convicted by plea.

Specifically, the *Halbert* Court noted that an appeal by right or by leave to Michigan's intermediate appellate court (the Court of Appeals) constituted a first-tier review of a defendant's case, the disposition of which, to some degree, entailed an adjudication of its merits. *Halbert, supra* at _____. Due process and equal protection demand that an indigent defendant not be deprived of counsel in advancing what will most likely be the only direct review the defendant's plea-based conviction and sentence will receive. *Halbert, supra* at _____.

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Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.60 Probation Violation

E. Sentencing

Replace the second paragraph on page 469 with the following text:

Whether a defendant's sentence of imprisonment is imposed immediately after conviction or after the imposition and revocation of probation, the legislative sentencing guidelines apply to that sentence when the sentencing offense was committed on or after January 1, 1999. *People v Hendrick*, ___ Mich ___, ___ (2005). In addition, MCL 771.4 permits, but does not require, a sentencing court to impose on the probationer the same penalty that could have been imposed instead of probation. Therefore, subject to any other applicable limits to a court's sentencing discretion, "it is perfectly acceptable to consider postprobation factors in determining whether substantial and compelling reasons exist to warrant an upward departure from the legislative guidelines." *Hendrick, supra* at ___.

An individual's probation violation alone—without regard to the specific conduct underlying the violation—may constitute a substantial and compelling reason to depart from the sentencing guidelines. *People v Schaafsma*, ___ Mich App ___, ___ (2005). According to the *Schaafsma* Court:

"[A]ny probation violation represents an affront to the court and an indication of an offender's callous attitude toward correction and toward the trust the court has granted the probationer. The violation itself is objective and verifiable, so we see no reason why a court must focus exclusively on the underlying conduct, especially since the conduct itself may be punished in a separate proceeding. We conclude that the offender's probation violation itself is an objective and verifiable factor worthy of independent consideration. Since the probation violation is objective and verifiable, in its discretion the trial court may conclude that the factor provides a substantial and compelling reason to depart from the sentencing guidelines." *Schaafsma, supra* at ___.

CHAPTER 5

Appeals & Opinions

Part I—Rules Governing Appeals to Circuit Court (MCR Subchapter 7.100)

5.4 Parole Board

D. Appeal From Parole Revocation

Insert the following text before subsection (E) on page 490:

That an individual who has been denied parole cannot appeal the decision in state court is not a violation of the individual's due process rights. *Jackson v Jamrog*, ___ F3d ___, ___ (CA 6, 2005). Where MCL 791.234(9) once authorized prisoners to appeal a parole board decision, the statute now provides prosecutors and crime victims with statutory authority to appeal a parole board's granting of parole. According to the Sixth Circuit, denying prisoners judicial review of parole board decisions is constitutionally sound. The Court explained:

“Employing the deferential rational-basis review standard in judging the statute, the district court concluded that the state's legitimate explanation—the attempt to minimize the number of frivolous prisoner appeals—rationally accounted for the differing treatment of prisoners on the one hand and prosecutors and crime victims on the other.” *Jackson, supra* at ___.